No. 58433-2-I

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH COUNTIES;
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Petitioners/Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF ECOLOGY, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC DEVELOPMENT, an agency of the State of Washington; LIVABLE COMMUNITIES COALITION; WASHINGTON ASSOCIATION OF REALTORS; and CITIZENS' ALLIANCE FOR PROPERTY RIGHTS

Defendants/Respondents,

CITY OF KENT,

Petitioner,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF ECOLOGY, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC DEVELOPMENT, an agency of the State of Washington; LIVABLE COMMUNITIES COALITION; WASHINGTON ASSOCIATION OF REALTORS; and CITIZENS' ALLIANCE FOR PROPERTY RIGHTS

Respondents.

Brief Amicus Curiae of Pacific Legal Foundation and Citizens' Alliance for Property Rights

On Direct Appeal from the Central Puget
Sound Growth Management Hearings Board

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION AND CITIZENS' ALLIANCE FOR PROPERTY RIGHTS

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INTRODUCTION

The Growth Management Hearings Boards do not have the authority to establish new rules and standards that do not appear in the Growth Management Act (GMA). *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 (2005); *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 233-34, 238 (2005). Despite this clear limitation on its authority, the Central Puget Sound Growth Management Hearings Board issued a decision radically construing the GMA to establish a new rule that "[s]aving and protecting the remaining wetlands has become a *statutory priority* and was so written into the GMA from the outset." Final Decision and Order (FDO) at 9 (emphasis added). Based on this construction, the Board concluded that as a matter of law local government cannot balance any of the GMA planning goals against the environment goal: "a jurisdiction may not assert the need to balance competing GMA goals as a reason to disregard specific GMA requirements [saving and protecting wetlands]." FDO at 13.

Applying this newly adopted rule, the Board rejected the City of Kent's authority to consider and balance local circumstances and the other GMA planning goals while developing its critical area regulations. As a result, the Board failed to recognize the discretion and deference that the Legislature expressly granted Kent in planning for future growth based on its local circumstances. RCW 36.70A.320; RCW 36.70A.3201; *Quadrant*, 154 Wn.2d at 233-34, 238. Because its decision was based on the creation of an

improper rule, the Board's Final Decision and Order constituted an erroneous interpretation and application of the law, and should be reversed.

ISSUE PRESENTED BY *AMICI*

The Growth Board erred when it established a rule that protecting the environment is a statutory priority of the GMA and that local government has no discretion to consider and balance the 13 non-prioritized planning goals in developing local critical area regulations, if the other goals conflict with protecting the environment.

ARGUMENT AND AUTHORITIES

The GMA requires that local government designate and protect critical areas. RCW 36.70A.060(2); RCW 36.70A.172(1). However, the GMA does not require a particular methodology for protecting critical areas. *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 167 (2004). At the GMA's very foundation is the mandate providing local jurisdictions broad deference in planning decisions: the "GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs." *Viking Properties*, 155 Wn.2d at 125-26; *see also* WAC 365-195-010(3) (The GMA "process should be a 'bottom up' effort . . . with the central locus of decision-making at the local level.").

It is local government–*not* the State or the Growth Boards–that is charged with making the discretionary determination of how best to protect the functions and values of its critical areas. RCW 36.70A.3201 ("Local

comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances."). The "Legislature left the cities and counties with the authority and obligation to take scientific evidence and to balance that evidence among the many goals and factors to fashion locally appropriate regulations based on the evidence and not on speculation and surmise." *Honesty in Environmental Analysis and Legislation v. Seattle (HEAL)*, 96 Wn. App. 522, 531-532 (1999). "Whether scientific evidence is . . . controlling or of no consequence when balanced against other factors, goals and evidence . . . is first in the province of the city or county to decide." *HEAL*, 96 Wn. App. at 532; *see also Clallam County v. Western Washington Growth Management Hearings Board*, 130 Wn. App. 127, 139 (2005) (The GMA requires that local government "must balance protecting the environment" against other GMA planning goals).

I

The Growth Board Erred In Concluding That Kent Could Not Consider and Balance All GMA Planning Goals in Developing Its Critical Area Regulations

The Growth Board did not have the authority to create a rule restricting local government's broad discretion by imposing a hierarchy amongst the GMA's planning goals. In *Viking Properties*, our Supreme Court held that the Growth Management Hearings Boards are "quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted

to a review of those matters specifically delegated by statute." *Viking Properties*, 155 Wn.2d at 129 (citing RCW 36.70A.210(6) and RCW 36.70A.280(1)). As a result, the Growth Boards "do not have authority to make 'public policy' even within the limited scope of their jurisdictions, let alone make *statewide* public policy." *Viking Properties*, 155 Wn.2d at 129 (emphasis in original). Specifically, the *Viking Properties* court rejected any attempt to elevate one GMA planning goal above the other goals:

> [Petitioner's] public policy arguments also fails to the extent that it implicitly requires us to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature's express statement that the GMA's general goals are nonprioritized . . . . *We decline Viking's invitation to create an inflexible hierarchy of the GMA goals where such a hierarchy was explicitly rejected by the legislature.*

Viking Properties, 155 Wn.2d at 127-28 (citations omitted; emphasis added); *see also Quadrant*, 154 Wn.2d at 246 ("[T]he GMA 'explicitly denies any order of priority among the thirteen goals.'") (quoting Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 11 (1999)). The GMA does not authorize the Growth Board to adopt any contrary presumptions or establish new requirements. RCW 36.70A.320; RCW 36.70A.3201; *Viking Properties*, 155 Wn.2d at 129.

Indeed, in *Quadrant*, the Supreme Court reaffirmed the principle that it is the job of the Legislature–not the Growth Boards–to determine public policy and create substantive requirements in the GMA. *Quadrant*, 154 Wn.2d at 247. As a result, the court specifically rejected the argument that

any one of the GMA goals can be read in insolation to create a substantive requirement or to limit the deference granted to local government. *Quadrant*, 154 Wn.2d at 246-47. Local government retains "broad discretion in adapting the requirements of the GMA to local realities." *Quadrant*, 154 Wn.2d at 236-37.

However, the Growth Board did exactly what our Supreme Court and Legislature prohibited: it established a rule elevating the singular goal of protecting the environment to the detriment of all other GMA goals. The Board did this by holding that protecting the environment is a "prioritized" goal of the GMA: "Saving and protecting the remaining wetlands has become a *statutory priority* and was so written into the GMA from the outset." FDO at 9 (emphasis added). The Board compounded this error by concluding that as a matter of law local government cannot balance any of the GMA planning goals against the environment goal. FDO at 13; 52-53.

The Board's error in this regard is threefold. First the conclusion that protecting the environment is a statutory priority contradicts the plain language of the GMA. Second, the conclusion that local government does not have the discretion to consider and balance the other planning goals against the environment goal is contradicted by established precedent. Third, the cases relied on by the Board were inapplicable.

II

The Plain Language of the GMA Does Not Permit the Board to Elevate Certain Planning Goals to the Detriment of Other Goals

The Growth Board's conclusion that the environment planning goal is "a statutory priority" contradicted the plain language of the GMA. *See Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 565 (1998) (The GMA carefully limits the Growth Boards' authority and contains no principle of liberal construction); Settle, *supra*, 23 Seattle U. L. Rev. at 34 (The "GMA was spawned by controversy, not consensus. The relative spheres of state mandate and local autonomy were the product of extremely difficult legislative compromise. It is no accident that the GMA contains no provision for liberal construction.").

Statutory meaning is a question of law that is reviewed de novo. *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 555 (2000). The court's primary goal in construing a statute is to determine and give effect to the Legislature's intent. *American Continental Ins. Co. v. Pollution Control Hearings Board*, 131 Wn.2d 345, 352 (1997). When faced with an unambiguous statute, courts will derive the Legislature's intent from the statute's plain language alone. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242 (2004).

The plain language of the GMA unequivocally states that the planning goals are non-prioritized: "The following goals are *not listed in order of*

priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations . . . ." RCW 36.70A.020 (emphasis added). Interpreting this section of the statute, our Supreme Court has held that the GMA "explicitly denies any order of priorities among the thirteen goals." *Quadrant*, 154 Wn.2d at 246; *see also King County*, 142 Wn.2d at 555 (in interpreting the GMA, "the Supreme Court is the final arbiter."). The Board's conclusion that the protection of the environment goal a "statutory priority" was erroneous and should be reversed.

III

Local Jurisdictions Have the Authority to Consider and Balance the GMA Goals When Developing Locally Appropriate Critical Area Regulations

The Growth Board's conclusion that Kent could not balance other GMA goals against the environment goal is also contradicted by established precedent on this very issue. In *WEAN*, this Court concluded that local government has the discretion to consider and balance all of the GMA goals when developing its critical areas regulations. *WEAN*, 122 Wn. App. at 173. The requirement that local government consider best available science in developing critical areas regulations "does not mean that the local government is required to adopt regulations that are consistent with BAS because such a rule would interfere with the local agency's ability to consider the other goals of GMA and adopt an appropriate balance between all the GMA goals." *WEAN*, 122 Wn. App. at 173. Indeed, the GMA's grant of local discretion necessarily includes the discretion to adopt critical areas regulations that

depart from the suggestions of its best available science based upon its consideration and balancing of the other goals of the GMA. *WEAN*, 122 Wn. App. at 173.

This Court similarly approved of local government's discretionary authority to depart from best available science based on its consideration and balancing of local circumstances in *Clallam County v. Western Washington Growth Management Hearings Board*, 130 Wn. App. 127 (2005). In that case, the Growth Board had adopted a policy approving of limited exemptions to critical areas ordinances for agricultural resource lands. *Clallam County*, 130 Wn. App. at 139. The Court held that, to the extent the Board's policy limited local government's planning discretion regarding other lands, the Board erred. *Clallam County*, 130 Wn. App. at 139. The Court explained that such a policy is contrary to the GMA's emphasis on balancing the goals and local circumstances—it is this "balancing that the County is entitled to engage in with its local circumstances in mind; and a balancing to which the Board must give the County considerable deference." *Clallam County*, 130 Wn. App. at 139.

WEAN and *Clallam County* restated and reinforced the fundamental GMA principle that local government is required to consider and balance local circumstances and other GMA planning goals in developing locally appropriate critical area regulations. In reviewing local planning decisions, the Growth Boards must accord considerable deference to local decision makers in this regard. The Board's conclusion that local government "may not assert

the need to balance competing GMA goals" against protection of the environment is contrary to the plain language of the GMA and this Court's opinions in *WEAN* and *Clallam County* and should be reversed as an error of law. FDO at 13, 52-53.

IV

The Cases Cited by the Growth Board Are Inapplicable

Finally, the cases cited by the Growth Board do not support its conclusion that protecting the environment is a statutory priority of the GMA. The Growth Board primarily sought support for this conclusion in *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543 (2000). In *King County*, our Supreme Court held that local government did not have the discretion to depart from express GMA requirements (conservation of agricultural lands for the maintenance and enhancement of the agricultural industry), even if it did so in furtherance of one or more of the GMA's other planning goals. However, the decision in *King County* was limited to the requirement that local government conserve agricultural land solely for agricultural purposes. The *King County* court did not address the role of the GMA planning goals in developing critical areas regulations.

In *King County*, the county had designated agricultural lands in its comprehensive plan. However, the plan permitted the use of certain agricultural parcels for recreational use as soccer fields. The county justified

designating this non-agricultural use as an "innovative technique."[1] As support for designating the soccer fields, the county cited to certain GMA planning goals, which directed local jurisdictions to identify recreation lands and encourage development of recreational land.[2]

The issue before the Supreme Court was whether a non-agricultural use could constitute an "innovative technique" as defined by RCW 36.70A.177. To answer this question, the court first held that designation of agricultural land was a requirement of the GMA, which expressly prohibited non-agricultural uses. *King County*, 142 Wn.2d at 556 (quoting RCW 36.70A.060(1)). Thus, in order to constitute an "innovative technique" consistent with the GMA, a development regulation must first satisfy the GMA's mandate "to conserve agricultural lands for the maintenance and enhancement of the agricultural industry." *King County*, 142 Wn.2d at 560. Under these circumstances, the Court held that a soccer field simply cannot constitute an "innovative technique" because such use does not constitute an agricultural use. *King County*, 142 Wn.2d at 561. As a result, the Court held that the county did not have the discretion to designate a non-agricultural use in an agricultural area–notwithstanding the GMA's

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[1] "A county or a city may use a variety of innovative zoning techniques in areas designated as agricultural lands .... The innovative zoning techniques should be designed to conserve agricultural land and encourage agricultural economy." RCW 37.70A.177(1).

[2] RCW 36.70A.150; RCW 36.70A.160.

planning goals encouraging designation of recreation land. *King County*, 142 Wn.2d at 561.

The Board similarly relied on *City of Bellevue v. East Bellevue Community Municipal Corporation*, 119 Wn. App. 405 (2003). In *Bellevue*, the city adopted an ordinance exempting certain types of development from the GMA's concurrency requirements. *Bellevue*, 119 Wn. App. at 412-13. But the GMA expressly prohibits any development that causes a decline in the "level of service" designated in the city's comprehensive plan. RCW 36.70A.070(6)(b). Recognizing the concurrency requirement, the city argued that it had the discretion to exempt certain developments to promote the other GMA planning goals. *Bellevue*, 119 Wn. App. at 413-14. The court rejected this argument because concurrency is a GMA requirement–not a goal. *Bellevue*, 119 Wn. App. at 414. And under the plain language of the GMA, local government could not create exemptions to its concurrency ordinance. *Bellevue*, 119 Wn. App. at 414.

Contrary to the GMA requirements at issue in *King County* and *Bellevue*, the requirement that local government designate and protect critical areas does not place any express limitations on local government's planning discretion or prohibit departure from best available science based on local government's balancing of GMA goals. *See* RCW 36.70A.170(1)(a); RCW 36.70A.060(2). This distinction is critical because the GMA–both in its plain language and as interpreted by our courts–instructs and authorizes local government to consider and balance all GMA planning goals to develop

locally appropriate critical area regulations. RCW 36.70A.320; RCW 36.70A.3201; *Clallam County*, 130 Wn. App. at 139; *WEAN*, 122 Wn. App. at 173; *HEAL*, 96 Wn. App. at 531-532.

Under the plain language of the GMA and well-established case law directly on point, the Growth Board lacked the authority to graft a prohibition against consideration of local circumstances and other GMA planning goals onto the GMA requirement that local jurisdictions develop regulations to protect critical areas. By improperly elevating the environment goal of the GMA above all others, the Board departed from Legislature's express directive that the GMA's goals are non-prioritized. RCW 36.70A.020; *Viking Properties*, 155 Wn.2d at 127; *Quadrant*, 154 Wn.2d at 246. This constitutes an error of law and the Board's decision should be reversed.

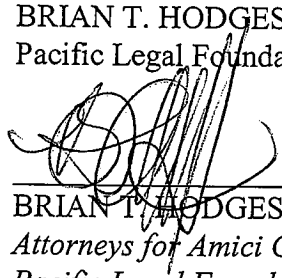
CONCLUSION

Amici Pacific Legal Foundation and Citizens' Alliance for Property Rights respectfully request that this Court reject the Growth Board's establishment of a new rule elevating protection of the environment to a "statutory priority" above all other GMA goals. This rule contradicts the plain language of the GMA and precedent. For the foregoing reasons, this Court should reverse the Growth Board's Final Decision and Order.

DATED: March 6, 2007.

Respectfully submitted,

BRIAN T. HODGES
Pacific Legal Foundation



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DECLARATION OF MAILING

I, BRIAN T. HODGES, hereby state:

I am a resident of the State of Washington, residing and employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004.

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 6th day of March, 2006, at Bellevue, Washington.

BRIAN T. HODGES